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Supreme Court, U.S.
FILED
JUL 26 2001
CLERK

No. 00-1656

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

WENDA K. SHALTRY, BANKRUPTCY TRUSTEE FOR HOME AMERICA T.V.-APPLIANCE AUDIO, INC., J.G. BOYD T.V.-APPLIANCE AUDIO, INC., AND CHARLESTON T.V. & APPLIANCE CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

July __, 2001

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REASONS FOR GRANTING THE WRIT

In its Brief in Opposition to the Petition, the government argues that: (a) the issue of whether petitioner and Chapter 11 bankruptcy trustee Wenda K. Shaltry's ("Shaltry") was entitled to utilize the avoidance powers in §§544-53 of the Bankruptcy Code in her 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether she was required to first bring an avoidance action and then subsequently litigate her tax refund claim, is narrow and uncommon, and therefore does not warrant this Court's review; (b) the conflict between the Eighth Circuit's decision in In re Russell, 927 F.2d 413 (8th Cir. 1991) and the Ninth Circuit's decision in this case do not create an irreconcilable conflict with regard to this issue; (c) the Ninth Circuit decision in Home America is correct on this issue, not the Eighth Circuit decision in Russell; and (d) Shaltry has not properly raised the issue of whether the post-petition act of Maryland Investments, Inc. ("Maryland") to consolidate itself with the Debtor for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549.

First, contrary to what the government claims, the issue of the appropriate procedure for bringing tax refund suits in a bankruptcy context is both a substantive procedural issue (one that is important to the interface of two separate and extensive statutory schemes, the Internal Revenue Code and the Bankruptcy Code), and one that is significant to many bankruptcy estates. The conflicts between the Eighth and Ninth Circuits on this issue are irreconcilable, and the decision of the Eighth Circuit in Russell best melds the goals of the Internal Revenue Code and the Bankruptcy Code, with an efficient judicial mechanism for resolving tax refund claims in the bankruptcy arena. Second, Shaltry did raise before the Ninth Circuit the issue of the debtor's parent corporation's post-petition consolidation with the debtor being void under 11 U.S.C.

§362, not merely voidable under 11 U.S.C. §549, so that this issue is properly before this Court.

I. The issue of whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether the trustee must first bring an avoidance action and then subsequently litigate her tax refund claim, is important and warrants this Court's review.

Whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action (as was held by the Eighth Circuit in Russell, at 927 F.2d 417), or whether the trustee must first bring an avoidance action and then a subsequent refund suit, each seeking the same relief (as the government argues, and as was held by the Ninth Circuit in In re Home America, at 232 F.3d 1050-51), is important and warrants this Court's review because it is now unclear what procedure a trustee or debtor-in-possession[1] must following in filing (and, if necessary, litigating) a refund claim.

The government's statement that "[t]he narrow question presented in this case has arisen only twice in any litigation of which we are aware," Brief in Opposition to the Petition, pp. 7-8, understates the importance of this issue. Regardless of how many cases have or have not dealt with this issue, bankruptcy trustees and debtors-in-possession are entitled to a clear rule on something as fundamental as the proper procedure for pursuing a federal tax refund, and a failure of this Court to provide a clear, efficient and

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[1] Pursuant to 11 U.S.C. §1107, a debtor-in-possession would face the same issues raised in this case as did Shaltry in her capacity as a Chapter 11 trustee, and so for purposes of the arguments made in the Petition and this brief, "trustee" and "debtor-in-possession" are interchangeable.

cost-minimizing rule like that adopted by the Eighth Circuit in Russell will leave bankruptcy trustees in other circuits uncertain over what course to pursue, and those in the Ninth Circuit burdened with a costly and impossible procedure.[2]

The "protection" offered by the government's suggested procedure -- implicitly adopted by the Ninth Circuit -- is wholly illusory. Even the government concedes that its proposed procedure "will require a trustee in many instances to file two separate proceedings," and that "this two-step process may be impossible because the avoidance action may be pending even as the period of limitation for refund claims expires." Brief in Opposition to the Petition, p. 10, n. 10. The sole remedy that the government suggests is as follows: "Petitioner [and, presumably, other trustees and debtors-in-possession in her position], however, could file a protective refund claim." Id.

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[2] The uncertainty created by the conflict between the procedures established by the Eighth Circuit's decision in Russell and the Ninth Circuit's decision in this case is not the same as the uncertainty that arises under a statute that is unclear as to what it forbids or requires. However, it is worth noting that at the heart of due process are the requirements that a statute clearly state the conduct forbidden or required, and that the statute provide fair notice thereof. See City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct.1849, 1859 (1999) (criminal statute violated due process because it was "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"; citation omitted); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 12-19, 98 S.Ct. 1554, 1561-65 (1978) (due process violated by municipal utility that failed to provide notice of availability of procedure for protesting termination of service); Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (replevin statutes held to violate due process; "the central meaning of procedural due process [is that] 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified'"; citations omitted). These same concerns for certainty and fair notice weigh in favor of determining that the above-discussed issue warrants this Court's review.

The problem with the government's argument is that if, as the government contends, a successful avoidance action is a precondition to a 26 U.S.C. §7422 refund suit, Shaltry could **not** have filed a "protective" refund suit. "Protective" actions are appropriate where the plaintiff faces uncertainty over the proper locus of personal jurisdiction; a plaintiff can file "protective" actions in alternative jurisdictions while simultaneously pursuing litigation in the plaintiff's chosen forum, pending resolution of the personal jurisdiction issue in that court. See, e.g., Wheeling-Pittsburgh Steel Corp. v. Donovan Wire and Iron Co., 614 F.2d 945, 945-46 (4th Cir. 1980). However, where no subject matter jurisdiction exists, the parties cannot create subject matter jurisdiction, by agreement or otherwise. See, e.g., Sosna v. Iowa, 419 U.S. 393, 398, 95 S.Ct. 553, 557 (1975) (parties may not stipulate to the existence of subject matter jurisdiction). This is so because subject matter jurisdiction is an Article III as well as a statutory requirement. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982). Even the courts cannot create subject matter jurisdiction where it does not otherwise exist. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574,583, 119 S.Ct. 1563, 1569-70 (1999).

Thus, had Shaltry followed the only course of action the government claims was available -- filing a premature "protective" 26 U.S.C. §7422 refund action, where no subject matter yet existed under 26 U.S.C. §6532 -- her refund suit would have been a nullity, and the Bankruptcy Court would have been required to dismiss, even if the government had acquiesced in Shaltry's bringing the action. As a matter of law, a "protective" action cannot be filed in a court that does not have subject matter jurisdiction **at the time the suit is filed**. See, e.g., Smith v. United States, 873 F.2d 218, 220-21 (9th Cir. 1989) (affirming dismissal of "protective action" brought under the Suits in Admiralty Act ["SIAA";46 U.S.C. §§741-52] and subject to the Clarification Act [50 U.S.C. App. §1291], where suit was filed

prematurely, before denial of administrative claim or passage of sufficient time after filing of administrative claim).

In Smith, the plaintiff filed an administrative claim with the Maritime Administration, Department of Transportation, and then filed two suits, the first a "protective" action filed before the SIAA statute of limitations for bringing suit had run (but before the time required by the Clarification Act after filing the administrative claim had elapsed), and the second after the required time from the filing of the administrative claim had lapsed under the Clarification Act, but after the SIAA statute of limitations had run. Id. at 873 F.2d 219-20. The District Court dismissed each of the two actions for lack of subject matter jurisdiction, the first for having been brought too soon after the administrative claim had been filed, and the second for having been brought after the statute of limitations had run. Id. The Ninth Circuit affirmed, following the District Court's reasoning. Id.

Here, the government's view of the law would leave bankruptcy trustees in Shaltry's position in even worse position than the plaintiff in Smith. Unlike the plaintiff in Smith (who could have avoided her dilemma by filing her claim earlier), the procedure that the government's view of the law necessarily demands – requiring the filing of two separate **and sequential** "avoidance" and "refund" actions, each seeking the same relief – gives trustees and debtors-in-possession no way of protecting themselves. On the one hand, if a trustee files a timely 11 U.S.C. §§544-53 avoidance action, unless she obtains a final, unappealable judgement in her favor within the time allowed by 26 U.S.C. §6532 – a result the government could easily avoid simply by appealing adverse decisions until the time ran out – then the trustee would be unable to bring a timely 26 U.S.C. §7422 tax refund suit. On the other hand, as Shaltry pointed out in her Petition, had she filed a premature "protective" 26 U.S.C. §7422 refund suit, the Bankruptcy Court would have been compelled to dismiss the action for lack of subject matter jurisdiction. See Petition

at pp. 17-20, citing Thomas v. United States, 755 F.2d 728, 729 (9th Cir. 1985) (holding there is no jurisdiction to hear a 26 U.S.C. §7422 refund suit, where the refund claim has not been rejected or not acted upon for six months). In short, the sole remedy proposed by the government --and implicitly adopted by the Ninth Circuit below -- is illegal and illusory.

In contrast to the absurdity and illegality of the procedure adopted by the Ninth Circuit below and now advocated by the government, the logic of the Eighth Circuit's reasoning in itsRussell decision is fair, sensible, cost-efficient, and does not deprive trustees of due process or impose any unreasonable burden on the government:

> The IRS argues that because §549 provides a bankruptcy cause of action, the bankruptcy statute of limitations applies. The Bankruptcy Code provides that an action or proceeding brought under §549 must be commenced within two years of the transfer sought to be avoided. [11 U.S.C.§549(d)]. . . . The IRS's argument fails because the Trustee's suit is not an action or proceeding under 11 U.S.C. §549, but rather a refund suit under 28 U.S.C. §1346(a)(1). The theory underlying the refund suit may involve a §549 unauthorized post-petition transfer, but that does not make it a §549 suit, and therefore §549's statute of limitations is inapplicable.

In re Russell at 927 F.2d 417.

Russell thus provides a clear, simple rule that trustees, debtors-in-possession, the Bankruptcy Courts, and even the government can follow: so long as the procedure established under the Internal Revenue Code for filing an administrative refund claim

with the IRS (and, if necessary, filing a 26 U.S.C. §7422 refund suit) is followed on a timely basis, a refund suit will not be dismissed as untimely. Under this procedure, the IRS receives precisely the notice called for under the Internal Revenue Code (i.e., the administrative refund claim must be timely filed with the IRS), and has the same opportunity to consider refund claims at the administrative level that it would if the taxpayer were not in bankruptcy.[3] If the IRS denies (or refuses to grant) the claim, the taxpayer must then bring its 26 U.S.C. §7422 refund action within the time allowed by the Internal Revenue Code. Thus, the IRS is allowed to follow all of its standard procedures without variation; the Bankruptcy Court is spared needless and duplicative litigation; and taxpayers are spared similar burdens, burdens still greater for trustees and debtors-in-possession, who generally have limited resources. Most important of all, the Russell approach does not require trustees to file illegal "protective" actions over which the Bankruptcy Courts could have no jurisdiction.

In summary, given the uncertainty faced by bankruptcy trustees and debtors-in-possession after the Ninth Circuit's ruling below, and given the awkward illegality of the sole remedial procedure proposed by the government, the issue of whether a trustee can utilize the avoidance powers in §§544-53 of the Bankruptcy Code in a 26 U.S.C. §7422 refund suit without bringing a separate avoidance action, or whether the trustee must first bring an avoidance action and then subsequently litigate her tax refund claim, warrants this Court's review.

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[3] Note that Shaltry filed her administrative refund claim with the IRS well within the 11 U.S.C. §549(d)(1) two-year statute of limitations for bringing a §549 avoidance action, so that the government interest that otherwise would be protected by the §549(d)(1) statute of limitations – the right to be put on notice of the existence of Shaltry's claim – was protected by the filing of the administrative claim.

II. The Eighth Circuit's decision in In re Russell, 927 F.2d 413 (8th Cir. 1991) and the Ninth Circuit's decision are in irreconcilable conflict with regard to the proper procedure for a bankruptcy trustee to follow in seeking a tax refund.

While the government admits that the Eighth Circuit's decision in Russell "reached a contrary result on an indistinguishable set of facts," the government also argues that the conflict "is not yet irreconcilable," citing the hypothetical possibility that the Eighth Circuit "may rehear the issue en banc if it is presented again in that circuit." Brief in Opposition to the Petition, pp. 9, 7-8 and n. 7. The government cannot, of course, cite any basis for its speculation on this point. In fact, the Eighth Circuit was presented with precisely the arguments the government makes here -- in the form of Judge Gibson's dissent in Russell, reported at 927 F.2d 419-20 and now quoted and relied upon by the government (see the government's Brief in Opposition to the Petition, p. 9) -- and rejected these very arguments. As has already been pointed out, the net result of allowing the conflict between the Eighth Circuit's decision inRussell and the Ninth Circuit's decision below to stand will be to leave trustees and debtors-in possession, the Bankruptcy Courts, and even the government uncertain as to the fundamental procedure required to obtain a refund.

III. The majority decision in Russell is correct, and the Ninth Circuit and the dissent in Russell are incorrect.

As Shaltry has already fully briefed the merits of this issue, Shaltry hereby relies on her arguments set forth in her Petition and the authorities cited therein, as well as her arguments and authorities set forth in the other portions of this brief.

IV. The issue of whether the post-petition act of Maryland to consolidate itself with Home America for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549, may be reviewed by this Court.

Contrary to what the government claims in its Brief in Opposition to the Petition, p. 10-11, Shaltry **did** raise the issue of whether the post-petition act of Maryland in consolidating with Home America for the purposes of gaining control over Home America's net operating losses was void under 11 U.S.C. §362, not merely voidable under 11 U.S.C. §549, before the Ninth Circuit. See Shaltry's January 2, 2001 Petition for Remand or in the Alternative, Rehearing, at pp. A-20 through A-22 below;[4] and the Petition at p. 13, ¶34. Consequently, this Court may review this issue and Shaltry's arguments and authorities cited at pp. 24-28 of the Petition.

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[4] Note that page number references in the Petition for Remand or in the Alternative, Rehearing reprinted in the appendix have been changed to reflect the smaller format required for appendices for this Court's briefs, but that otherwise the brief as reprinted herein is identical to the brief that was filed with the Ninth Circuit.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in her Petition, Shaltry prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, with regard to the decision of that court reported as In re Home America, 232 F.3d 1046 (9th Cir. 2000).

RESPECTFULLY SUBMITTED this ____ day of July, 2001.

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APPENDIX

No. 98-16631

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOME AMERICA T.V.-APPLIANCE AUDIO, INC.,
J.G. BOYD T.V.-APPLIANCE AUDIO, INC.,
CHARLESTON T.V. & APPLIANCE CO.,

Debtors,

UNITED STATES OF AMERICA,

Appellant,

v.

WENDA K. SHALTRY; MARYLAND INVESTMENTS, INC.,

Appellees.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PETITION FOR REMAND OR IN THE ALTERNATIVE, REHEARING

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II. This case should be remanded to the Bankruptcy Court for further proceedings, so that evidence concerning the application of the doctrine of equitable tolling can be introduced allowing the Trustee to pursue her refund claim notwithstanding 11 U.S.C. §549(d) A-13

III. Alternatively, this Court should rehear this matter, on the grounds that the Trustee's refund action is not barred by the statute of limitations contained in 11 U.S.C. §549, because the Trustee's filing of her refund claim constituted the timely commencement of an "action or proceeding," within the meaning of this phrase as used throughout the Bankruptcy Code A-17

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INTRODUCTION AND STATEMENT OF COUNSEL

Bankruptcy Trustee Wenda K. Shaltry moves this Court for remand pursuant to 28 U.S.C. §2106 or, alternatively, a rehearing pursuant to F.R.A.P. 40. The Trustee first asks the Court to remand this matter back to the Bankruptcy Court for findings of fact pertinent to the issue of equitable estoppel and equitable tolling because the Trustee was never previously required (nor, more particularly, given the opportunity) to develop such facts due to the procedural history of the case. As is further explained in the first portion of the Argument section below, because the Government filed a motion to dismiss/motion for summary judgment rather than answering the Trustee's complaint, and because the Government lost that motion (and the Trustee's subsequent motion, which pointed out that the Bankruptcy Court's findings on the Government's motion constituted a sufficient basis for awarding judgment in favor of the Trustee) as a result of the Bankruptcy Court's determinations of the applicable law (now undone by this Court's Opinion), the Trustee never had cause or opportunity to put on all of her evidence. Indeed, had the Trustee attempted to proceed with an evidentiary hearing, in circumstances where the Bankruptcy Court was indicating that it was prepared to rule in favor of the Trustee as a matter of law (which the Bankruptcy Court subsequently did), the Bankruptcy Court would have been puzzled at the least by the Trustee's conduct. Now that this Court has rejected the Bankruptcy Court's interpretation of the law, however, it is only fair that the Trustee be allowed to present the evidence that is now material and relevant as a result of this Court's decision. Given these facts, under 28 U.S.C. §2106 it is "just under the circumstances" to remand this case to the Bankruptcy Court so that the case can be decided on its merits, rather than as a result of its particular procedural history. See, e.g., Waters v Thornburgh, 888 F.2d 870, 877-78 (D.C. Cir. 1989).

Alternatively, the Trustee raises two legal arguments not previously considered because (1) if the Circuit's decision stands, the application of the phrase "action or proceeding" will be at odds with its use in other parts of Title 11 of the United States Code ("Bankruptcy Code") and (2) an egregious violation of the automatic stay will go unaddressed and the result will be a $1.6 million windfall to the Government.[5] The relief sought is consistent with the standard set forth in this Court's decision of In re Professional Investment Properties of America v. Kent, 955 F.2d 623, 625 (9th Cir., 1992):

> Generally, an appellate court will not consider arguments not first raised before the district court unless there were exceptional circumstances. . . . The specific "exceptional circumstances" that this circuit has identified are as follows: (1) review is necessary to prevent a miscarriage of justice; (2) a new issue arises while an appeal is pending because of a change in the law and (3) the "issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

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[5] Because the Government has raised many different issues in its efforts to avoid paying out the refund due to the estate, the Trustee has not previously had the opportunity to brief this Court fully on the issue that this Court's Opinion was decided upon; thus, of the Trustee's previously-filed 56-page Response Brief, only pp. 47-51 addressed the issue that this Court has now found to be decisive, because at the time it appeared not to be a primary issue. In these circumstances, the Trustee believes it is fair and proper to more fully brief and consider this issue.

These two arguments must be considered (1) to prevent a miscarriage of justice (allowing the stay violation and its resulting $1.6 million windfall to the Government) and (2) because the Court's holding departs from the only previous existing law on point (In re Russell, 927 F.2d 413 (8th Cir. 1991)).

ARGUMENTS

I. This case should be remanded to the Bankruptcy Court for further proceedings, so that evidence concerning the Government's conduct in misleading the Trustee into relying upon the Government's representations (made within two years of the Trustee's appointment) that the Trustee's refund claim would be granted and that it was only a matter of time until the refund would be issued, can be fully developed.

In its Opinion of November 15, 2000, this Court found that the Trustee failed to show actual reliance on the Government's actions in waiting to file suit until September 24, 1991. Opinion, Sec. B(2). The Trustee respectfully states that, because of the procedural history of this case, she has never had the opportunity to put on evidence of her reliance on the Government's actions, and therefore requests that this case be remanded so that the Bankruptcy Court can make findings of fact with regard to the Trustee's reliance on the Government's actions.[6]

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[6] In this section the Trustee is seeking remand of the case, rather than consideration of an issue not raised below. Thus, the Ninth Circuit's standard for considering such issues does not directly apply. However as the standard in In re Professional Investment Properties of America, 955 F.2d at 625 (9th Cir. 1992) suggests, where the procedural history of the case has been such so that there was no requirement or opportunity to develop the pertinent factual record in the trial court, it would be a miscarriage of justice not to

In her First Amended Complaint Seeking Tax Refund, the Trustee alleged, among other things, that the Government had sent the certain September 17, 1991 letter (referred to in Trustee's initial brief to this Court, at pp. 4-5, and in this Court's Opinion at p. 14615), for the purpose of showing that she had relied upon this representation. See also the Trustee's First Amended Complaint, ¶14. Had the case proceeded in a manner that would have required the Trustee to put on her evidence on this point, she would have done so.

However, the Government did not answer the Trustee's complaint; instead, it filed a motion to dismiss/motion for summary judgement. See the Government's Motion to Dismiss/Motion for Summary Judgment, filed on or about February 17, 1993, (in the previously-filed Trustee's Supplemental Excerpts ("TSE"), pp. 25-31). In the Trustee's response brief, the Trustee specifically noted the September 17, 1991 letter, and that it was the only written indication she had of the Government's intent. See the Trustee's Response Brief filed March 22, 1993, at p. 10, attached hereto as Ex. 1. In her brief, the Trustee relied substantially in this brief on the majority opinion in In re Russell, 927 F.2d 413 (8th Cir. 1991), which the Bankruptcy Court necessarily accepted in ultimately ruling for the Trustee.

In its reply brief filed on or about April 7, 1993, attached hereto as Ex. 2, the Government nowhere disputed the Trustee's arguments that she had relied on the Government's letter of September 17, 1991. The Bankruptcy Court then denied the Government's motion to dismiss/motion for summary judgement. See TSE , p. 34.

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allow a remand of the case to allow the trial court to make findings of fact on the issue in question.

The Trustee subsequently moved for summary judgment in her favor, on the grounds that the Bankruptcy Court's denial of the Government's motion to dismiss/motion for summary judgement left no issues to be resolved in order to grant the Trustee the relief she sought. See Trustee's summary judgment papers and reply brief, Ex. 3 attached. The Government's response to the Trustee's motion for summary judgment did not argue that the Trustee had not relied on the Government's conduct. See TSE, p. 38. The Bankruptcy Court subsequently granted the Trustee's motion for summary judgment. See TSE p. 47.

In short, because at no point did the Government further challenge the Trustee's claim that she had relied on the Government's conduct in delaying bringing this action, the issue was not further litigated before the Bankruptcy Court and no evidence (aside from the September 17, 1991 letter itself, which had already been made a part of the record as an attachment to a brief) was submitted by either party.

The Government then appealed on a number of grounds to the District Court. The District Court vacated and remanded for one purpose only - to have Maryland Investments, Inc. ("Maryland") added as a party, on the grounds that Maryland was a necessary party to the refund action. See District Court's orders dated April 16, 1995 and September 7, 1995, Appellant's Excerpt of Record ("AER") pp. 6 and 22. Given the limited scope of the remand, the Trustee was neither entitled to or required to put on evidence of her reliance on the Government's conduct in delaying the filing of her refund suit.

Consequently, because (a) the Government never disputed the Trustee's reliance on its conduct, and (b) because this case was decided at both the Bankruptcy Court and the District Court levels on the basis that the majority opinion in In re Russell correctly stated the law, the Trustee has never been required to present or had the

opportunity to present evidence of her reliance on the Government's conduct in delaying her refund suit. Now that this Court has ruled that the majority opinion in In re Russell does not correctly state the law, and has made the Trustee's reliance on the Government's conduct a material issue of fact, this case should be remanded to the Bankruptcy Court to allow the Trustee to present her evidence on this issue and to allow the Bankruptcy Court to make the appropriate findings of fact. See 28 U.S.C. §2106, authorizing remand where further proceedings "may be just under the circumstances"; see also Youngstown Sheet and Tube v. Lucey Products, 403 F.2d 135, 138-41 (5th Cir. 1968) (finding, in similar circumstances to those presented here, that remand was proper, so that the case could be decided on its merits).

II. This case should be remanded to the Bankruptcy Court for further proceedings, so that evidence concerning the application of the doctrine of equitable tolling can be introduced allowing the Trustee to pursue her refund claim notwithstanding 11 U.S.C. §549(d).

The doctrine of equitable tolling is distinguishable from the doctrine of estoppel.[7] While estoppel focuses on the conduct of the other party, equitable tolling focuses on whether, through no fault of her own, the plaintiff was unaware of the events giving rise to the claim at the time they occurred, even though the defendant took no active steps to prevent the filing of a suit. See Wright & Miller, Federal Practice and Procedure, §1056, nn. 25.1 and 25.2 and accompanying text (2000). Significantly, the §549(d) statute of

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[7] For the same reasons set forth in the preceding portion of this brief relating to the procedural history of this case, the Trustee did not previously have reason or opportunity to create a record of the evidence that would be material and relevant to determining the application of the doctrine of equitable tolling here.

limitations is not jurisdictional, and is therefore subject to the doctrine of equitable tolling. See In re Olsen, 36 F.3d 71, and n.2 (9th Cir. 1994) (holding that §549(d) statute of limitations may be equitably tolled); Smith v. Mark Twain Nat'l Bank, 805 F.2d 278, (8th Cir. 1986) (stating that the §549(d) statute of limitations is not jurisdictional); see also Norton Bankruptcy Law and Practice 2d, §59:7 (2000) ("Every court to consider the issue has concluded that equitable tolling applies to §549(d)"). Accordingly, a Bankruptcy Court may also exercise its equitable power under §105(a) to recover post-petition transfers at any time, the §549(d) statute of limitations notwithstanding. See In re EZ Feed Cube Co., 123 B.R. 69, 74 (Bkrtcy. Ore. 1991) (court could order former attorney for debtor-in-possession to repay improper post-petition disbursements despite expiration of §549(d) period).

While the period provided for in §549(d) runs from the time of the postpetition transfer and not from the date of the appointment of the trustee, "equity dictates that the[§549(d)]two-year statute of limitations period begin[s] to run only after the trustee knew or should have known of the transfer." In re Dakota Drilling, 135 B.R. 878, 888 (Bkrtcy. N.D. 1991) (holding in case converted from Chapter 11 to Chapter 7 that §549(d) period would begin to run only after date of conversion; cited with approval on this point by this Court in In re Olsen, 36 F.3d 71, 73 n. 2 (9th Cir. 1994)). In In re Olsen, this Court held that where former debtors-in-possession ("DIPs") conveyed property postpetition to their son after conversion to Chapter 7 and appointment of a trustee, the §549(d) statute of limitations was tolled by the "convey[ance of] the property to their son without court authorization and without notice to the trustee," stating "the trustee had no duty to routinely check if the [former DIPs] had clouded legal title. [The trustee] was entitled to rely on the [former DIPs'] prior statements [made in their schedules] and presumed willingness to cooperate." Id. at 36 F.3d 73. "Because the trustee remained in the dark 'without any fault or want of diligence

or care on his part,' the statute did not begin running until he discovered the conveyance." Id.[8]

Equitable tolling does not depend on a finding of actual fraud or concealment. Smith v. Mark Twain National Bank, 805 F.2d 278, 294 (8th Cir. 1986) (reasonable reliance on conduct in question, even where conduct was not intentionally misleading, gave rise to equitable tolling); In re Dakota Drilling, 135 B.R. 878, 888 (Bkrtcy. N.D. 1991) ("This conduct need not be active or intentional; in some situations the inequitable conduct may be passive"; holding that debtor's failure to disclose the transfer in question caused the §549(d) period not to begin to run until the case converted from Chapter 11 to Chapter 7); see also In re Bookout Holsteins, 100 B.R. 427, 430 (Bkrtcy. N.D. Ind. 1989) ("the rationale which supports the proposition, that the conduct of defendant may estop it from claiming

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[8] Unlike the situation presented in In re Gardenhire, 209 F.3d 1145 (9th Cir. 2000), the transfer of the NOLs in this case was not an "innocent" act. While the Government is the ultimate transferee of the NOLs (see In re Feiler, 218 F.3d 948, 956 (9th Cir. 2000)), the transfer of the Debtor's NOLs was made in order to deprive the Trustee and the estate of the NOLs, so that they could be used by another, just as in Feiler. Consequently, this Court's comment in Gardenhire that the line of cases represented by Olsen provides only "limited support" for tolling in instances involving a party that "stand[s] to benefit from literal application of the law but who engaged in no fraud or other wrongful conduct" has no application here, where the party that stood to benefit, Maryland, engineered the transfer prior to the appointment of the Trustee for the specific purpose of depriving the estate of the Debtor's NOLs.

under the statute as a bar, has broadened the doctrine to also include conduct other than active concealment").[9]

Here, as this Court noted in its Opinion, an involuntary bankruptcy was filed against the Debtor by its creditors on September 6, 1989. On September 14, 1989, the Debtor's parent corporation, Maryland, caused the Debtor to consent to the filing of a consolidated return, effecting the post-petition transfer of the Debtor's Net Operating Losses ("NOLs").[10] On September 26, 1989, the Trustee

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[9] That the Trustee should be allowed to present evidence to show that the §549 period should not be deemed to have begun to run until sometime after the actual date of the transfer is also supported indirectly by this Court's holding in In re Mizuno, 223 F.3d 1050 (9th Cir. 2000) (in an involuntary case, the §546 statute of limitations did not begin running until appointment of trustee). While this is a §549 case and not a §546 case, this Court's holding in Mizuno did recognize that there is no trustee in an involuntary case, defacto or otherwise, until the trustee is actually appointed. Furthermore, although the evidence is not yet in the record, because this was an involuntary case, there were no schedules disclosing the existence of this transfer at the time the Trustee was appointed, and the trustee only learned of the existence and nature of the transfer as a result of her own subsequent investigation and other events subsequent to her appointment. Since, in such circumstances, the Trustee cannot reasonably be deemed to have knowledge of the postpetition transfer as of the date of her appointment, the Trustee should be allowed to present evidence to the Bankruptcy Court to show that the §549 period should not be deemed to have begun to run until sometime after the date of her appointment.

[10] For purposes of this brief, the Trustee will not dispute this date.

was appointed.[11] At that time, the Trustee received no bankruptcy schedules and statements disclosing the consolidation election. Maryland had every reason to withhold that information. Upon remand the Trustee can and will introduce evidence upon which the Bankruptcy Court can decide whether equitable tolling applies. The Government will also be entitled to present whatever evidence it may have, and so cannot claim that it would be unfairly prejudiced in any way. To deny the Trustee that opportunity given the undeveloped posture of this appeal would be inconsistent with 28 U.S.C. §2106 and would result in a miscarriage of justice.

III. Alternatively, this Court should rehear this matter, on the grounds that the Trustee's refund action is not barred by the statute of limitations contained in 11 U.S.C. §549, because the Trustee's filing of her refund claim constituted the timely commencement of an "action or proceeding," within the meaning of this phrase as used in the Bankruptcy Code.

As this Court noted in its November 25, 2000 Opinion, there is no question but that the Trustee filed her claim for refund with the Government and put the Government on notice of what she was attempting to do long before the §549(d) statute of limitations expired, no matter how that period is measured; it is only if the filing of the Trustee's refund claim is not treated as an "action or proceeding" under §549(d) that there is any issue at all.

The purpose of a statute of limitations is axiomatic: To give a defendant timely notice that a claim is being asserted, so that the

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[11] The Court's Opinion states (in §1 Background) that the Trustee was appointed September 22, 1989. However, an examination of the docket sheet in the previously-filed Trustee's Excerpt of Record, p. 298, item #29, confirms that the Trustee was not appointed until September 26, 1989.

defendant can marshal and/or preserve whatever evidence it needs to defend itself. Here, the Trustee did exactly that by filing her claim for refund with the Government. It is highly unfair for the Government to argue, as it has here, that a statute of limitations should operate to bar the Trustee's claim for refund on the grounds that while the Trustee had properly followed the formal administrative procedure established by the Government to assert her claim for refund -- filing her claim for refund well before the expiration of the two-year period provided for in §549(d), no matter when that period is deemed to have commenced running -- the Trustee failed to timely sue the Government for its failure to properly grant the refund claim on its merits.[12]

The Trustee respectfully submits that her claim for refund should indeed be treated as the requisite "action or proceeding," thereby satisfying the §549(d) statute of limitations, notwithstanding that this Court reads the phrase "action or proceeding" very narrowly in its Opinion. The phrase "action or proceeding" as found in

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[12] In her opening brief on appeal, the Trustee claimed that she had brought her suit on her claim for refund on the first day possible under the statutes governing refund actions. In its reply brief, the Government pointed out that the Trustee had brought her refund suit four months (not six months) after filing her claim for refund, as the Trustee had claimed, and the Trustee then filed a supplemental brief withdrawing her argument that she had filed her refund suit on the first day possible under the statutes governing refund actions. However, the counsel for the Trustee who drafted the prior briefs for this Court was not counsel for the Trustee at the time the refund suit was originally filed, and so was unaware that the then-counsel for the Trustee had relied upon 11 U.S.C. §505(a)(2)(B)(i) in filing suit exactly four months after the Trustee had filed her refund claim with the Government. Consequently, there is no question that the Trustee was acting as expeditiously as possible in filing her refund suit.

§549(d) appears in eight other locations in the Bankruptcy Code. See 11 U.S.C. §§325, 362(a)(1), 362(b)(1), 362(b)(2)(A), 362(b)(4), 546(a), 550(f) and 922(a)(1). While the meaning of "action or proceeding" has not been litigated with respect to its use in §549(d) (or the similar §546(a)), it has been extensively litigated in the context of the automatic stay of §362.

The legislative history of §362 makes clear that the "scope of this section is very broad and encompasses all proceedings, even those not before governmental tribunals." H.R. No. 595, 95th Cong., 2d Sess. at 340 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6297. For example, in In re International Heritage, Inc., 239 B.R. 306, 310-11 (Bkrtcy. E.D.N.C. 1999), the court held that administrative proceedings brought against the debtor by a state commissioner of securities came within prohibition in 11 U.S.C. §362(a)(1) of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . ." The court went on to find that any monetary recovery from the debtor would be prohibited under §362(a)(1), but that to the extent the state was seeking to enforce its police or regulatory power, the administrative proceeding would not be barred by §362(a) because §362(b)(4) provides that §362(a) "does not operate as a stay 'of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police or regulatory power[.]'" Id. at 239 B.R. 311.

Other decisions under §362 support the conclusion that "action or proceeding" includes actions taken at the administrative level, not just litigation or other adversarial contested proceedings. Thus, the suspension by the Department of Health and Human Services of Medicare Care payments to a provider that had filed bankruptcy was held to constitute an "action or proceeding" against the debtor, the commencement or continuation of which is prohibited by §362(a). In re Medicar Ambulance Co., 166 Br. 918, 926-28

(Bkrtcy N.D. Cal. 1994). In another case, a proceeding brought by a state bar to recover costs assessed against an attorney in a disciplinary action has been held to be excepted from the§362(a) automatic stay as an "action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" under §362(b)(4). In re Williams, 158 B.R. 488, 491 (Bkrtcy. Idaho 1983). Similarly, the United States Custom Service's administrative "liquidation" of its claim against a debtor post-petition has been held to constitute a violation of §362(a) stay. In re Apex Oil Co., 122 B.R. 559, 566-67 (Bkrtcy. E.D. Missouri 1990), aff'd on this issue at 131 B.R. 712, 714-15 (E.D. Missouri 1991). As is noted in both the opinions in Apex Oil, §362 includes a specific provision (§362(b)(9)) that specifically permits a governmental unit to (A) conduct an audit to determine a tax liability; (B) issue a notice of tax deficiency; (C) demand tax returns; or (D) make an assessment for any tax and issue a notice and demand for payment (while barring any tax lien that would otherwise arise from applying. Consequently, as the above-cited cases make clear, the term "action or proceeding" as used in §362 -- and therefore, the entire Bankruptcy Code, including §549(d) -- is intended to include administrative actions of taxing agencies, since otherwise there would be no need to exempt the administrative actions of a taxing entity from the automatic stay. To hold, as this Court has done, that the filing of an administrative claim for refund is not an "action or proceeding" in the context of the Bankruptcy Code is a clear departure from all reported cases interpreting the phrase "action or proceeding," and opens the door to a confused and inconsistent reading of the term "action or proceeding," notwithstanding its repeated use by the Code's drafters throughout the Code.

IV. The post-petition action taken by Maryland Investments to effect a consolidation and thereby avail itself of the benefits of the Debtor's NOLs, violated the automatic stay and under the clear precedent in this Circuit is void, not voidable.

It is undisputed that on September 6, 1989 Home America's creditors filed an involuntary bankruptcy petition initiating this case, and that on September 14, 1989 Maryland mailed its tax return claiming to have irrevocably consolidated itself with the Debtor for the purposes of tax consequences, pursuant to Internal Revenue Code §172(b)(3)(C). Simultaneously, Maryland, as controlling parent of the Debtor, caused the Debtor to consent to the election. The net effect of the consolidation was an "act to obtain possession of property of the estate" or "to exercise control over property of the estate" as contemplated under Bankruptcy Code Section 362(a)(2).

Under clear Circuit precedent such an act is void, not voidable. The case of In re Schwartz, 954 F.2d 569, 574 (9th Cir. 1992) goes to great lengths to stress that the "law in this Circuit is that violations of the automatic stay are void . . ."Schwartz presented a situation where the IRS had issued a penalty assessment during the pendency of a prior bankruptcy case. In the subsequent case, the debtors challenged the assessment. The Court offered some explanation about the differences between §§362 void actions and 549 voidable actions and concluded that:

> Section 362's automatic stay does not apply to sales or transfers of property initiated by the debtor. Thus section 549 has a purpose in bankruptcy beyond the potential overlap with section 362. In other words, the automatic stay can void any violation and still leave section 549 with a valid and important role in bankruptcy. Section 549 exists as a protection for creditors against unauthorized debtor transfers of

> estate property. Although there are circumstances where section 362 overlaps section 549 and renders it unnecessary, this overlap falls far short of rendering section 549 meaningless. (emphasis added).

In this case, Maryland initiated and benefitted (as did the Government) from the election and the Debtor merely (acting as Maryland's puppet) consented to it. Consent of the debtor is insufficient to lift the stay without more. See, e.g., In re Rothenberg, 173 B.R. 4, 14 (Bkrtcy. D.C. 1994), where the court stated:

> An act to create a lien against property of the estate is stayed pursuant to section 362(a)(4). Moreover, even if the [document in question] is invalid and/or does not constitute a lien, [the creditor's] actions were an attempt to exercise control over property of the estate, which is likewise stayed pursuant to section 362(a)(2). The court does not believe that section 303(f)[13] applies to excuse [the creditor's] action which were clear violation of the automatic stay, regardless of whether the debtor consents. (emphasis added)

IRS form 1122 (signed by an authorized representative of the Debtor) (see Exhibit 4) is entitled "Authorization and Consent of Subsidiary Corporation to be included in a Consolidated Income Tax Return." It provides consent no different from a debtor consenting to a lien, as occurred in Rothenberg. The filing the consolidated

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[13] Bankruptcy Code Section 303(f) applies to gap periods in involuntary cases (the period between the Bankruptcy case filing and the time an order for relief is entered) –exactly the situation in the case at bar.

return is tantamount to recording of a lien form, and the Home America's nominal consent does not cure what is an act to obtain possession or exercise control over property of the debtor. The postpetition election to consolidate and transfer the NOLs must be recognized as a violation of the automatic stay, and is therefore void.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court remand this case to the Bankruptcy Court for further proceedings to develop the evidence of the events that actually occurred so that the doctrines of equitable tolling and equitable estoppel or, alternatively, for rehearing on the issues of law set forth above.

RESPECTFULLY SUBMITTED this 2nd day of January, 2001.

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By:_____

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STATUTORY APPENDIX

The phrase "action or proceeding" appears in nine (9) separate times in the Bankruptcy Code:

1. 11 U.S.C. §325 provides: "A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding."

2. 11 U.S.C. §362(a)(1) imposes: "a stay, applicable to all entities, of --- (1) the commencement or continuation of . . . a judicial, administrative, or other action or proceeding against the debtor . . ."

3. 11 U.S.C. §362(b)(1), defines the §362(a)(1) stay so that it does not included: " . . . the commencement or continuation of a criminal action or proceeding against the debtor. . . ."

4. 11 U.S.C.§362(b)(2)(A), provides that the §362(a)(1) stay does not bar: ". . . the commencement or continuation of an action or proceeding for -- (i) the establishment of paternity; or (ii) the establishment or modification of an order for alimony . . ."

5. 11 U.S.C. §362(b)(4) provides that the §362(a)(1) stay does not bar: " . . . the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction . . ."

6. 11 U.S.C. §546(a) provides that: "An action or proceeding under section 544, 545, 547, 548, or 553" may not be commenced after [the expiration of the specified statute of limitations]."

7. 11 U.S.C. §549(d) provides that: "An action or proceeding under this section may not be commenced after [the expiration of the statute of limitations provided for]."

8. 11 U.S.C. §550(f) provides that: "An action or proceeding under this section may not be commenced after the [expiration of the statute of limitations provided for]."

9. 11 U.S.C. §922(a)(1) provides that a petition filed under Chapter 9 stays, in addition to the §362(a)(1) stay, of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor . . ."

ORIGINAL and THREE COPIES filed
by hand delivery this 2nd day of
January, 2001 to:

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